84-1380

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1984
No.

FRED W. ALLNUTT, SR., Appellant
v.
STATE OF MARYLAND, Appellee
ON APPEAL FROM THE COURT OF APPEALS
OF MARYLAND

JURISDICTIONAL STATEMENT

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401pb

QUESTIONS PRESENTED

Whether under Article I, Section 10 of the Constitution of the United States the State can require payment of taxes in irredeemable Federal Reserve notes where such taxes are "debts" as defined by State statutes.

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OPINION BELOW

The Opinion of the Maryland Court of Special Appeals appears in 59 Md. App. 694, 478 A.2d 321 (1984), and is included herein as Appendix A (pp A.1-17).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action charging Appellant with nine counts of wilful failure to file retail sales tax returns, wilful failure to pay retail sales tax and wilful failure to file a Maryland income tax return. A jury verdict of guilty on all counts was rendered on June 16, 1983 in the Circuit Court for Howard County. A timely order of appeal to the Court of Special Appeals of Maryland was filed on September 23, 1983. The Mandate was issued on August 16, 1984 and Appellant timely filed a Petition for Certiorari to the Court of Appeals of Maryland on August 30, 1984. Certiorari was denied by Order dated December 4, 1984.

A timely notice of appeal was filed on February 5, 1985 in the Maryland Court of Appeals. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, sub-paragraph (2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Article 1, Section 10, Clause 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts, pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATUTES

Title 31, U.S.C.A. Section 311

It is declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts. And it is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.

Title 31, U.S.C.A. 405 a-3

Silver certificates shall be exchangeable for silver bullion for one year following June 24, 1967. Thereafter they shall no longer be redeemable in silver but shall be redeemable from any moneys in the general fund of the Treasury not otherwise appropriated.

Title 31 U.S.C.A. Section 408a

Except to the extent permitted in regulations which may be issued hereunder by the Secretary of the Treasury with the approval of the President, no currency of the United States shall be redeemed in gold: Provided, however, That gold certificates owned by the Federal Reserve banks shall be redeemed at such times and in such amounts as, in the judgment of the Secretary of the Treasury, are necessary to maintain the equal purchasing power of every kind of currency of the United States: And provided further, That the security for gold certificates (including the gold certificates held in the Treasury for credits payable therein) shall be maintained in gold bullion equal to the dollar amounts required by law.

No redemptions in gold shall be made except in gold bullion bearing the stamp of a United States mint or assay office in an amount equivalent at the time of redemption to the currency surrendered for such purpose.

Title 31, U.S.C.A. Section 463

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provison shall be contained in or made with respect to any obligation hereafter incurred.

Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currecny which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking association.

Maryland Annotated Code, Article 81, Section 317

Every tax imposed by this subtitle, and all increases, interest and penalties thereon, shall become, from the time it is due and payable, a personal debt, from the person or persons liable to pay the same to this State, and shall be entitled to the same priority and collectible in the same manner as other State taxes are preferred and collectible under the provisions of this article.

Maryland Annotated Code, Article 81, Section 320

The failure on the part of any person or taxpayer to file a return or report as required by the provisions of this subtitle, or to comply with any action taken by the Comptroller pursuant to § 304 hereof shall be deemed a violation of the provisions of this

subtitle subject to penalty and interest as prescribed in § 318 hereof. The wilful failure on the part of any person or taxpayer to file a return or a report as required by the provisions of this subtitle or to comply with any action taken by the comptroller pursuant to § 304 hereof shall be a misdemeanor, subject to a fine of not exceeding $1,000 or imprisonment for not exceeding 1 year, or both, in the discretion of the court.

Maryland Annotated Code, Article 81,
Section 342(a)

(a) Personal debt; limitation of actions. The tax imposed by this subtitle and all increases, interests and penalties thereon shall become, from the time due and payable, a personal debt of the person liable to pay the same to the State of Maryland. An action may be brought at any time within four (4) years from the time the tax shall be due and payable by the Comptroller in the name of the State to recover the amount of any taxes, penalties and interest due under the provisions of this subtitle, but if there is proof of fraud or gross negligence, there shall be no limitation of the period in which the action may be brought. Proof of negligence amounting to twenty-five percent (25%) or more of the tax due shall be prima facie evidence of gross negligence.

Maryland Annotated Code, Article 81,
Section 344

(a) Penalty for failure to file return and pay tax when due. - If a taxpayer fails to file any return or pay the tax when due as required by this subtitle, there shall be assessed agaisnt him, in addition to the tax due, a penalty of 10 percent of the tax due,

plus interest at the rate determined under § 204 of this article from the time the tax was due until paid. Whenever any person fails to file a return with 10 days of notice or demand by the Comptroller, the Comptroller shall compute the tax from the best information available, which determination shall be prima facie correct.

(b) Fraud. - If the failure to file any return is due to an attempt to defraud, then the penalty shall be, in lieu of the penalty more specifically provided for by subsection (a) of this section, 100 percent of the tax due, plus interest at the rate determined under § 204 of this article from the time the tax was due until paid.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

Appellant, an excavating contractor, did not file a 1981 income tax return nor did he file sales tax returns and pay the sales tax due the State. At trial, the issues raised in Appellant's defense related to the question of wilfulness and the ability of the State to require payment of taxes in irredeemable paper money where State statutes define taxes as "debts." (Maryland Annotated Code, Article 81, §§317,342).

Much of the testimony at trial concerned conflicting federal statutes relating to money, such as Title 31, U.S.C.A., Section 311 and Title 31, U.S.C.A., Sections 405a-3, 408a, and 463. Further testimony concerned the relation of Article I, Section 10 of the U.S. Constitution to Maryland statutes defining taxes as "debts." The evidence in Appellant's case showed that his review of

the conflicting statutes and the Constitution raised questions in his mind concerning his legal duty and the power of the State to require payment of taxes in irredeemable Federal Reserve notes.

The trial judge refused to instruct the jury on the applicable federal and state statutes or on the U.S. Constitution. Rather, the jury was instructed that the law was clear and Appellant was subsequently found guilty of wilful failure to file returns and pay taxes under Maryland Annotated Code, Article 81, §320 and §344.

The Court of Special Appeals affirmed the convictions and held that Article I, Section 10 bars the State, but not the Congress, from declaring legal tender to be anything other than gold or silver. (A.9)

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions in that this Court has not ruled on the issue of payment of taxes in paper money since the so called "Legal Tender Cases," notably Juilliard v. Greenman, 110 U.S. 421 (1884), and the "Gold Clause Cases" such as Norman v. Baltimore and Ohio Railroad, 294 U.S. 240 (1935). Even as of the date of the ruling in Norman, the expressed policy of the United States was to continue the use of both gold and silver as standard money, to coin both gold and silver into money of equal intrinsic value and to maintain the parity in value of coins of the two metals and the equal power of each dollar in the markets. Acts of 1 November, 1893, Ch. 8., 28 Stat. 4, then 31 U.S.C. Sec. 311. Since those rulings, Federal Reserve notes were declared by Congress in 1967 to be irredeemable in either gold or silver. (31 U.S.C. §§405a-3, 408a).

As this Court said in another "Legal Tender" case, Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870):

> [t]he legal tender acts [of 1862 and 1863] do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promise to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. *** It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value. Id. at 533.

Justice Bradley in his concurring opinion in Knox emphasized that the power to make United States Notes legal tender:

> is entirely distinct from that of coining money and regulating the value thereof.*** It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed.***

> No one supposes that these government certificates are never to be paid--that the day of specie payments is never to return. *** And their payment may not be made directly in coin, but they be first convertible into government bonds, or other government securities. Through whatever changes they pass, their ultimate destiny is to be paid.
>
> So with the power of government to borrow money, *** when exercised in the form of legal tender notes or bills of credit, it may operate for the time being to compel the creditor to receive the credit of the government in place of the gold which he expected to receive from his debtor. Id. at 560, 561-562, 565.

Since 1967, irredeemable Federal Reserve notes are "never to be paid," have no intrinsic value and constitute merely an empty promise to pay. At the present time, there is, in fact, nothing of intrinsic which value the government has to pay or make good on such promise.

This Court must review the issues presented herein in light of Congressional legislative changes since this Court last directly addressed such issues.

In this case, the Maryland State statutes define taxes as "debts." At trial, an expert witness testified that Maryland is one of the few states where taxes are so defined and that Article I, Section 10 is thus directly and literally applicable. Yet, Maryland Annotated Code, Article 81, §§320, 344 allow the State to prosecute a taxpayer for wilful failure to pay. The criminal prosecution of the taxpayer for refusing to pay in irredeemable paper money is, then, a violation of Article I, Section 10 of the Constitution of the United States. The State is constitutionally forbidden to require such payment. Therefore, the lower court's ruling which affirmed Appellant's convictions must be reversed.

For the reasons stated above, Appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated:_____, 1985

Respectfully submitted,

_____
James L. Mayer

_____
Susan S. James
Attorneys for Appellant

APPENDIX

REPORTED IN

THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1588

September Term, 1983

FRED W. ALLNUTT, SR.

v.

STATE OF MARYLAND

Gilbert, C.J.

Getty

Bell,

JJ.

Opinion by Gilbert, C.J.

Filed: July 17, 1984

The State believes that it has the right to require that taxes be paid in the generally accepted United States currency — Federal Reserve Notes. Fred W. Allnutt, Sr., a Maryland resident, thinks the State may not collect taxes except in gold or silver specie. Allnutt reasons that since that form of currency does not exist, taxes, while due, cannot be constitutionally paid.

A twelve person jury in the Circuit Court for Howard County obviously accepted the State's view, because they convicted Allnutt of nine counts of wilfully failing to file retail sales tax returns as well as wilfully failing to pay sales tax. Additionally, Allnutt was convicted of wilfully failing to file a 1981 State income tax return.

Judge Guy J. Cicine sentenced Allnutt to one and one-half years imprisonment, and also imposed a fine. The prison term was suspended

and Allnutt was placed on probation for a period of five years, but only the first year of the probation is to be supervised.

In this Court Allnutt asserts:

1) the trial judge erred in refusing to give the jury a requested instruction;

2) the trial judge erred in instructing the jury that it was only to judge the facts of the case; and

3) there was not sufficient evidence with which to convict Allnutt of wilful failure to file tax returns and pay sales taxes.

Allnutt is a successful excavating contractor who admitted he did not file a 1981 income tax return, despite a gross income in excess of $400,000.00 for that year. Additionally, Allnutt acknowledges that he neither filed sales tax returns nor did he pay the sales tax that was due the State. In defense of those delinquencies, he contends that the Constitution of the United States precludes the State from collecting payment of taxes other than in gold or silver specie.

Allnutt reads and interprets Article 1,

§10 of the Federal Constitution as prohibiting the State from collecting monies in other than the "coin of the relm," i.e., gold or silver.[1] He seems to imply that if the Congress authorizes gold and silver as specie, he would have no trouble paying taxes. As matters now stand, he cannot so pay because he believes Federal Reserve Notes are not redeemable legal currency.

Provocation for Allnutt's eventual challenge to the Maryland tax statute is attributed to an incident Allnutt had with the Retail Sales Tax Division of the State Comptroller's Office.[2] In response to whatever occurred,

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[1]Article 1, §10 of the Federal Constitution states in pertinent part: "No State shall ...make any Thing but gold and silver Coin a Tender in Payment of Debts..."

[2]The record reflects the existence of the incident but fails to state its nature or essence.

Allnutt undertook a researching task that led him to think that the State of Maryland had no legal right to demand tax payments in dollars. He wrote to the Maryland Attorney General and to the Retail Sales Tax Division for clarification. His letters said, in part:

> "One, is Article 1, §10 (of the U.S. Constitution) still binding on the State of Maryland? Two, if Article 1, §10 is still binding can each citizen be enforced to pay his or her debts in present Federal Reserve Notes if they are objected to? Three, am I correct in my understanding that gold and silver are declared as the money of account, of the United States, that Maryland must conform to, that Title 31, §371 of the United States Code?"

Allnutt's letters went unanswered. He misinterpreted the non response as acquiesence in his belief that he did not have to pay taxes. Allnutt testified:

> "(M)y studies...led me to believe that the gold and silver monetary system was the only lawful monetary system for which to pay taxes. I have studied ...the meaning of a dollar and the meaning of a dollar sign. In reviewing these forms they did not say on there to compute the tax in Federal

Reserve Notes or obligations of the United States. They said to compute it in dollars. I was confused as to, in how to do that."

The jury, as we have seen, was not confused; it found Allnutt guilty of all ten charges.

I.

Allnutt contends that it was error for Judge Cicone to refuse to instruct the jury regarding the miscellaneous federal statutes and constitutional provisions which led to Allnutt's "confusion."[3] Those instructions, as the State elucidates, would have required the jury to determine, in light of the "confusing" federal law, whether Allnutt's actions were "wilful." Instead of giving the requested instruction, Judge Cicine told the jury:

> "Since each act is required to be wilful I...advise you that the defendant's

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[3]Specifically, Allnutt requested instructions as to the requirements of Article 1, §10 of the U.S. Constitution as well as the following federal statutes: 31 U.S.C. 311, 31 U.S.C. 371, 31 U.S.C. 4051-3, 31 U.S.C. 408a, 12 U.S.C. 44, 31 U.S.C. 742. In addition, Allnutt asked that the jury be instructed with respect to Md. Ann. Code Art. 81, §§ 280(c)(1),

conduct is not wilful if he acted through negligence, inadvertence or mistake, or due to his good faith, or misunderstanding of the requirements of the law. It should be pointed out, however, that a defendant's disagreement with the law, no matter how earnestly held, does not constitute a defense of good faith, misunderstanding, or mistake. It is the duty of all citizens to obey the law, whether they agree with it or not. One of the elements of the crimes charged...is wilful failure to file a return or pay a tax. Wilfulness may be established through proof, that Mr. Allnutt's failure...constituted a voluntary intentional violation of a known legal duty. In other words, the State must prove that Mr. Allnutt must have known clearly and without a doubt, that he had a legal duty which was clearly stated to him, to file the return demanded by the State or pay the tax in order for the element of wilfulness to be proven by the State. Before wilfulness can be found, a clear legal duty must first be found." (Emphasis supplied.)

The emphasized portion of the instruction is a mirror image of the language used by Chief Judge Murphy for the Court of Appeals in Johnson v. State, 294 Md. 515, 451 A.2d 330 (1982), to define "wilful" as used in

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[3](cont.) 294(a)(2), 294(a)(3), 317, and 342.

the State income tax law.[4] He wrote that, "wilfulness may be established through proof that the accused's failure to file constituted a voluntary intentional violation of a known legal duty, not the result of accident or mistake or other innocent cause." 294 Md. at 518-19.

Judge Cicone's instructions to the jury adequately embraced established law and carefully tracked Johnson, supra. There was no error.

II.

Allnutt further faults the trial judge's instruction to the jury that, "In the present case, the law which is to be applied, is clear and thus you should only act as judge of the facts."

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[4] Chief Judge Murphy was referring specifically to Md. Ann. Code Art. 81, § 320.

In furtherance of his argument with regard to the jury's being the judge of the law and fact, Allnutt realleges his assertions that Federal Reserve Notes are not legal tender and, therefore, his obligations under the law were unclear. We observe that the Eighth Circuit has twice declared Federal Reserve Notes to be taxable dollars. United States v. Rifen, 577 F. 2d 1111 (8th Cir. 1978) and United States v. Daly, 481 F.2d 28 (8th Cir. 1973), cert. denied, 414 U.S. 1064 (1973). We share the Eighth Circuit's view.

It is apparent to us that Allnutt misreads Article 1, §10 of the U.S. Constitution. The section prohibits the States from declaring legal tender to be anything other than gold or silver, but that constitutional barrier does not extend to the Congress. It is free to declare what constitutes legal tender for the payment of taxes and other debts. Juilliard v. Greenman [Legal Tender Case], 110 U.S. 421, 446, 4 S.Ct. 122, 28 L.Ed. 204 (1884); Veazie Bank v. Fenno, 75 U.S. 533, 548 (8 Wall. 533), 19 L.Ed. 482 (1869).

The Congress, through 31 U.S.C. 392, has specifically said that Federal Reserve Notes "shall be legal tender for all debts, public and private, public charges, taxes, duties and dues." See Solyom v. Md.-Nat'l Cap. P. & P. Comm'n, 53 Md. App. 280, 284, 452 A.2d 1283 (1982); United States v. Rifen, supra; Chermack v. Bjornson, 302 Minn. 213, 223 N.W. 2d 659, 661 (1974), cert. denied, 421 U.S. 915 (1975).

Allnutt's attack upon the federal law is at best a red herring dragged across the trail to throw off the hounds in pursuit of the fox.

Having determined that Allnutt's duty to pay taxes in Federal Reserve Notes was clear, we return whence we started our discussion on this issue, namely, the jury's being the judge of fact, not of the law.

Maryland is one of the two States [5] in the nation which provides, constitutionally, that juries in criminal cases are judges of

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[5] Indiana is the other State. Constitution of the State of Indiana, Article 1, § 19.

the law as well as of the fact. Article 23 of the Declaration of Rights to the Maryland constitution provides, in pertinent part:

> "In the trial of all criminal cases, the Jury shall be the Judges of law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." (Emphasis supplied.)

The predecessor of the italicized portion of that particular fiat was first incorporated in the Maryland Constitution of 1851. The clause pertaining to sufficiency of the evidence was not added until one hundred years later when Laws 1949, ch. 407 was ratified by the electorate on November 7, 1950.

Until Stevenson v. State, 289 Md. 167, 179, 423 A.2d 558, was decided on December 17, 1980, it was generally believed by bench and bar that a judge's comments as to the law in a criminal case were advisory and not binding on the jury. A jury - twelve lay persons - was to determine not only the evidence but the law of the case. The jury was not free, however, to disregard existing law or to enact new law, nor was it permitted to

decide helter skelter what the law should be rather than what it was. Hamilton v. State, 12 Md. App. 91, 277 A.2d 460 (1971), aff'd 265 Md. 256, 288 A.2d 885, cert. denied, 409 U.S. 1006, 93 S.Ct. 445, 34 L.Ed. 2d 298 (1972). Notwithstanding the jury's being judges of the law, it was not permitted to pass upon the constitutionality of a statute. Giles v. State, 229 Md. 370, 183 A.2d 359 (1962); Franklin v. State, 12 Md. 236 (1858). More often than not, we surmise, the jury followed the judge's advisory instruction because the jurors, as lay persons, would not usually be familiar with the intricacies of law. Stevenson temporarily muddied the waters; what had been clear became murky. Stevenson told us that a jury's judicial role was limited to the "law of the crime" and "that all other legal issues are for the judges alone to decide." Stevenson v. State, 289 Md. at 166. Confusion then arose as to what was meant by the term "law of the crime."

One year later the Court in Montgomery v. State, 292 Md. 84, 437 A.2d 654 (1981), sought to still the roiling waters by explicating Stevenson. The message of Montgomery is that Article 23 of the Maryland Declaration of Rights and Md. Rule 757 b, [6] which provides much the same thing, are "limited to those instances when the jury is the final arbiter of the law of the crime"; that is to say where there is a dispute as to the state of the law. "[W]here there is no dispute nor a sound basis for a dispute as to the law of the crime, the court's instruction are binding on the jury and counsel as well." Montgomery v. State, 292 Md. at 89.

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[6] Md. Rule 757 b provides:

> "The court may, and at the request of any party shall, give those advisory instructions to the jury as correctly state the applicable law. The court may give its instructions orally or, with the consent of the parties, in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. In every case in which instructions are given to the jury the court shall instruct the jury that they are the judges of the law and that the court's instructions are advisory only."

A distillation of Stevenson and Montgomery leads us to conclude that it will be a rare case indeed where there is "a dispute or sound basis for a dispute" as to the "law of the crime." We envision that such a dispute could arise when an accused is charged with an attempt to commit a crime, yet the evidence shows the crime was completed. The jury might then be called upon to decide the law of the crime. Does the completion of the crime include the attempt to commit it? Is the accused too guilty to be guilty as charged?

Instances of dispute of the law of the crime are an endangered species rapidly approaching extinction. Once an appellate court has ruled on the "law of the crime," the matter then becomes settled law, and thereafter the jury is no longer the judge of the law with respect to that particular matter. Consequently, disputes of the law of the crime will decrease in number with each successive appellate ruling.

In the instant case, Judge Cicone, as we initally noted, instructed the jury that, "the law which is to be applied is clear and ...you should only act as judge of the facts." He went on to state:

> "[U]nder the Constitution of the State of Maryland the jury in a criminal case is the judge of the law as well as the facts. However, this does not mean that you are to conform to what you feel the law should be or what you would like it to be. Nor does it mean that the jury is to make new law or ignore clearly existing laws. What it does mean is that the jury is to act as judge of the law if the law which should be applied, is uncertain or there is a dispute as to preexisting law."

The instruction does more than satisfy Stevenson v. State, supra, and Montgomery v. State, supra. Indeed, in light of Montgomery, the instruction given by Judge Cicone seems to confer more upon Allnutt than he is entitled to receive.

We think it the better practice for judges to avoid instructing a jury that it is the judge of the law, unless there is an actual dispute or sound basis for a dispute as to the law of the crime. Ordinarily,

there is no need for a judge to comment to the jury upon the language of Article 23 of the Maryland Declaration of Rights or of the provisions of Md. Rule 757b.

III.

The appellant's final grasp at victory falls short. He asseverates that the evidence was insufficient to sustain his conviction because the State did not show that his failure to pay taxes or file returns was wilful. Almost, as if viewing an instant replay, we are again compelled to revisit Allnutt's sortie on the federal laws. Because he relied on those federal laws, Allnutt avers that he acted in good faith and, therefore, cannot be convicted of wilfully failing to comply with the Maryland income tax and retail sales tax acts. Neither the State, Judge Cicone, the jury nor we share that view.

The evidence was crystalline that Allnutt voluntarily and intentionally failed, neglected or refused to perform a legal duty,

namely, file a 1981 income tax return and pay the tax. He further voluntarily and intentionally failed, neglected or refused to file sales tax reports or to pay the sums due the State.

The element of wilfulness does not require proof of any particular motive other than an intentional and voluntary violation of a legal duty. Johnson v. State, supra; United States v. Rifen, supra. Evidence that Allnutt in prior years paid Maryland income taxes, as well as retail sales taxes, is sufficient to demonstrate that his failure to file returns in 1981 was purposeful, deliberate, voluntary and intentional.

JUDGMENTS AFFIRMED

COSTS TO BE PAID BY APPELLANT.

FRED W. ALLNUTT, SR.	:	IN THE
	:	COURT OF
	:	APPEALS OF
vs.	:	MARYLAND
	:	PETITION NO.413
STATE OF	:	SEPTEMBER TERM,1984
MARYLAND	:	(No.1588,September
	:	Term, 1983
	:	Court of
	:	Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: December 4, 1984

IN THE COURT OF APPEALS OF MARYLAND

FRED W. ALLNUTT, SR.	:	PETITION DOCKET NO. 413
v.	:	September Term, 1984 (No. 1588, September Term,
STATE OF MARYLAND	:	1983, Court of Special Appeals)

: : : :

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Fred W. Allnutt, Sr., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment the Court of Appeals of Maryland denying Appellant's Petition for a Writ of Certiorari, entered in this proceeding on December 4, 1984.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2). Dated: February 4, 1985

FILED: FEB. 5, 1985

James L. Mayer
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Attorney for Appellant

CERTIFICATE OF SERVICE

I, James L. Mayer, a member of the Bar of the Supreme Court of the United States and counsel of record for Fred W. Allnutt, Sr., Appellant herein, hereby certify that on Febraury 4, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served one copy of the foregoing Notice of Appeal on each of the parties herein as follows:

Deborah K. Chasanow, Esquire, Assistant Attorney General, counsel for the State of Maryland, Appellee herein by depositing such copies in the United States Post Office, Ellicott City, Maryland, with first class postage prepaid, properly addressed to the post office address of Deborah K. Chasanow, the above-named appellee's counsel of record at 7 North Calvert Street, 4th Floor, Baltimore, MD. 21202.

All parties required to be served have been served.

Dated: February 4, 1985

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No. 84-1380

Office-Supreme Court, U.S.
FILED
APR 1 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRED W. ALLNUTT, SR.,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF
SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

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The Daily Record Co., Baltimore, MD 21202

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NO. 84-1380

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

FRED W. ALLNUTT, SR.,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON APPEAL FROM THE COURT OF

SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS OR,
IN THE ALTERNATIVE,
MOTION TO AFFIRM

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, Appellee moves

the Court to dismiss the appeal herein on the grounds that the federal question was not timely or properly raised and was not expressly passed on, and that the appeal does not present a substantial federal question, as hereinafter set forth. In the alternative, Appellee moves that this Court affirm the judgment of the State court for want of a substantial federal question.

PERTINENT STATUTORY PROVISIONS

In addition to the provisions reprinted in Appellant's jurisdictional statement, Appellee submits the following provision as relevant: Md. Ann. Code (1980 Repl. Vol.), Art. 81, §325(a):

> "(a) For the privilege of selling certain tangible personal property at retail as defined above and for the privilege of dispensing certain selected services as defined as sales at retail by §324(f) of this subtitle a vendor shall collect from the purchaser a tax at the rate specified in this section on the price of each separate retail sale made in this State. The tax imposed by this section shall be paid by the purchaser and shall be computed subject to the terms and conditions of §334 of this subtitle, as follows: . . . ."

STATEMENT OF FACTS

This is an appeal from an affirmance by the Maryland Court of Special Appeals of Appellant's conviction for nine counts of willful failure to file retail sales tax returns, willful failure to pay retail sales tax, and willful failure to file a Maryland income tax return in 1981. Allnutt v. State, 59 Md. App. 694, 478 A.2d 321, cert. denied, 301 Md. 639, 484 A.2d 274 (1984).

Appellant raised no pre-trial motions challenging the validity of any state statute. Rather, he introduced evidence at trial concerning alleged conflicts between federal statutes relating to money and to federal reserve notes. Additionally, Appellant produced testimony on Article I, §10 of the United States Constitution concerning the authority of the State to require an accounting for tax purposes and payment of taxes in any tender other than that backed by gold or silver. The thrust of Appellant's defense was that the confusion caused by conflicts in federal

law concerning federal reserve notes made his failure to file or pay taxes other than "willful." Nevertheless, Appellant was convicted on all counts.

On appeal to the Maryland Court of Special Appeals, Appellant raised the following issues:

1. Considering that there was testimony throughout the case concerning Article 1, §10 of the Constitution, the statute declaring the federal policy of a monetary system based on a parity with gold and silver and the exemption of obligations of the United States from taxes, did the Trial Judge err in not instructing the jury on the law relating to such issues?

2. When there was evidence of contradictory federal statutes and constitutional provisions regarding monetary issues raised in the case and when the State used such contradictions in its closing argument, did the Trial Judge err by instructing the jury that the law was clear and the jury was only to judge the facts in the case?

3. Given the contradictory federal statutes on the monetary system, as well as Appellant's undenied good faith attempts to seek advice from the State on such issues before filing a return, was the

evidence sufficient to convict Appellant of a willful failure to file and pay?

Finding sufficient evidence to convict and no procedural error, the Court of Special Appeals affirmed the convictions. A petition for writ of certiorari to the Maryland Court of Appeals was denied on December 4, 1984.

ARGUMENT

A.

BECAUSE THE ISSUE RAISED WAS "NOT PRESSED OR PASSED UPON BELOW," THE APPEAL SHOULD BE DISMISSED.

Appellant has noted this appeal under 28 U.S.C. §1257(2). In order for appellate jurisdiction to be invoked under that subparagraph it is necessary that the validity of a State statute be "drawn in question" on the basis of repugnancy to the constitution, treaties or laws of the United States, with the ultimate decision being in favor of the statute's validity. While, arguably, the question presented by Appellant here draws into question the validity of a state statute on constitutional grounds (although no statute is

designated as being repugnant in Appellant's jurisdictional statement) the question has not previously been properly raised in any state forum and no decision has been rendered by any Maryland court. As a result, the appeal should be dismissed. Rules of the United States Supreme Court, Rule 16(1)(b).

In Illinois v. Gates, 462 U.S. 213, __, 103 S. Ct. 2317, 2321-22, 76 L.Ed.2d 527, 535 (1983), this Court quoted its earlier decision in McGoldrick v. Compagnie Generale, 309 U.S. 430, 436 (1940):

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that

> this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

Similarly, in Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), this Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, . . . and since . . . ."

As noted in the Statement of Facts, supra, and as readily discernable from a review of the opinion of the

Court of Special Appeals (Juris. Stat., A.1-A.17), the questions presented for appellate review in the state court did not draw into question the validity of the state statute. Rather, the appellate issues presented to the state court involved: (1) whether the jury should have been instructed on federal law; (2) whether the jury should have been instructed that they were the judges of the law in accordance with Article 23 of the Maryland Declaration of Rights due to the "conflict" in federal law; and (3) the sufficiency of the evidence. The "conflict" referred to in (2) above was not between state and federal law, but was alleged to be within the federal law alone. Moreover, the issue presented here could not have been raised through the request for an instruction in accordance with Md. Decl. of Rights, Article 23, because that provision does not place questions of constitutionality in the hands of the jury. Giles v. State, 229 Md. 370, 383, 183 A.2d 359, 365 (1962), app. dis. 372 U.S. 767 (1963).

In Street v. New York, 394 U.S. 576, 584 (1969),

this Court quoted its earlier decision in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), as follows:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."

In this case, the issues presented by Appellant to the Maryland courts have not properly drawn into question the validity of any state statute. His appeal should accordingly be dismissed.

B.

BECAUSE THIS APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION, THE APPEAL SHOULD BE DISMISSED, OR IN THE ALTERNATIVE, THE JUDGMENT SHOULD BE AFFIRMED.

Assuming arguendo that the question presented on appeal here had been presented to the State court, and further assuming arguendo that the question

presented draws into question the validity of a state statute, the appeal, nevertheless, should be dismissed or, in the alternative, affirmed for want of a substantial federal question.

In Equitable Life Assurance Society of the United States v. Brown, 187 U.S. 308, 311 (1902), it was stated:

> "[I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court'. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. New Orleans Water-works Company v. Louisiana, 185 U.S. 336, 345, 46 L.Ed. 936, 941, 22 S.Ct. Rep. 691, and authorities

> there cited. . . . It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject."

See also Zucht v. King, 260 U.S. 174, 176 (1922) ("although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character," citing Sugarman v. United States, 249 U.S. 182, 184 (1919)).

It is immediately apparent that no substantial

federal question is presented by the instant appeal. Appellant questions the validity of a statute requiring "payment of taxes in irredeemable federal reserve notes where such taxes are 'debts' as defined by State statutes" (Juris. Stat. at p. i). Yet, all but one of Appellant's convictions were for failure to file returns; his failure to pay income tax was not prosecuted. The one conviction relating to payment involved Appellant's failure to remit sales tax to the State that he collected on behalf of the State. See, Article 81, §325(a), Md. Ann. Code (1980 Repl. Vol.). The "debt" provisions set forth by Appellant become operative only after the tax has become due and payable. See Art. 81, §342(a). Thus, had Appellant timely remitted to the State the funds collected from the purchasers no "debt" would have arisen. Appellant's convictions do not relate to his failure to pay a "debt;" his convictions relate to his failure to pay over funds collected and file returns. As a result, any interpretation of Article I, §10 of the United States

Constitution simply does not come into play.

Even if Article I, §10 were relevant to Appellant's challenge, his interpretation is so frivolous as to warrant either dismissal of the appeal or affirmance of the state court judgment. Courts have unanimously interpreted Article I, §10 of the United States Constitution as a restriction on the state's power to adopt its own currency, not on the Congress' ability to adopt federal reserve notes as legal tender. See Julliard v. Greenman, 110 U.S. 421 (1884); Radue v. Zanaty, 308 S.2d 242 (Ala. 1975); Allen v. Craig, 564 P.2d 552 (Kan. App. 1977); People v. Lawrence, 333 N.W.2d 525 (Mich. App. 1983); Chermack v. Bjornson, 223 N.W.2d 659, (Minn. 1974), cert. denied, 421 U.S. 914 (1975); Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978); Leitch v. State Department of Revenue, 519 P.2d 1045 (Ore. App. 1974); City of Colton v. Corbly, 323 N.W.2d 138 (S.D. 1982). There being no restriction on the United States Congress, federal reserve notes have been held validly to constitute taxable dollars.

United States v. Rifen, 577 F.2d 1111 (8th Cir. 1978); United States v. Daly, 481 F.2d 28 (8th Cir. 1973), cert. denied, 414 U.S. 1064 (1973). These decisions are in conformity with this Court's legal tender cases, see Julliard v. Greenman, supra, and re-examination of Article I, §10 of the United States Constitution is not required. As a result, even if the question was properly presented to the State court, the appeal should be dismissed for want of a substantial federal question. In the alternative, the law being clear, the decision of the State court should be affirmed without further briefing or argument.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the appeal from the Court of Special Appeals of Maryland be dismissed

or, in the alternative, that the decision of the state court be affirmed without further briefing or argument.

Respectfully submitted,

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